-1391

No.

APR 16 1973

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1972

~~72-1391~~

JOSEPH JEROME SCALISE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

No.

October Term, 1972

JOSEPH JEROME SCALISE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Joseph Jerome Scalise prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 16, 1973.

OPINION BELOW

The Court of Appeals did not publish an opinion in this case. The order of the Court of Appeals affirming petitioner's conviction is reprinted as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments to the Constitution of the United States prohibit submission of a case to a jury on an aiding and abetting theory of liability where the indictment fails to charge the defendant as an aider and abettor.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *

STATUTES INVOLVED

Title 18, Section 2, United States Code, provides in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Title 18, Section 659, United States Code, provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or

other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

STATEMENT

Petitioner and one Guy Bills were indicted by the grand jury of the Northern District of Illinois in a one-count indictment charging them with possession of merchandise (23 cartons of Sears Roebuck products) alleged to have been stolen from an interstate shipment, in violation of Section 659, Title 18, United States Code. Following a jury trial, the defendants were adjudged guilty as charged. Petitioner was sentenced to the custody of the Attorney General for a period of eight years. Upon Scalise's appeal to the United States Court of Appeals for the Seventh Circuit, questioning the sufficiency of evidence to warrant submission of the case to the jury on the charge that he had possession of the stolen goods, the propriety and constitutionality of also charging the jury in accordance with the aider and abettor statute, and the sufficiency of evidence to warrant submission of the case to the jury on that theory, Scalise's conviction was affirmed. (App. A, *infra*, p. 2)

On the evening of November 5, 1970 suburban Chicago police officers discovered a sport van truck containing merchandise suspected to have been taken in a local burglary parked on a major thoroughfare in Oak Park, Illinois. The officers established a surveillance of this

vehicle. (Tr. 374-91).[1] Shortly thereafter, petitioner Scalise drove up, parked in front of the van, exited his automobile, crossed the street, and entered an apartment building. (Tr. 435-7)

Later that evening a vehicle, subsequently discovered to be driven by Scalise, pulled alongside the van. Bills exited the vehicle, entered the van, and drove off. Scalise followed the van. The police officers followed the van and Scalise. During the ensuing three or four block drive, one block of which was through an alley, the police attempted to pass Scalise in order to reach the van. Scalise maneuvered his car in such a manner as to frustrate these efforts. After a short chase, the van turned left and Scalise continued on, abandoning his attempt to thwart the police. (Tr. 521-2; 630-3) The police followed the van. After curbing it and arresting Bills they discovered the Sears products which were the subject of this indictment and items taken in the burglary of a local appliance store. (Tr. 522-5; 534)

A further search of the van revealed a Sears catalog on the right front seat. (Tr. 535, 584) Fifteen latent fingerprints found on this catalog matched those of the petitioner. (Tr. 598, 602) In addition, different items had been circled in the catalog. These items were either identical or similar to the Sears items found in the van. (Tr. 301-6) It could not be determined when, in relation to the circling of these items, Scalise's fingerprints had been placed on the catalog. (Tr. 610-11)

In response to Petitioner's claim that this evidence did not warrant submission of his case to the jury on the theory that he was in possession of the stolen Sears merchandise, the Court of Appeals ruled:

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[1] Tr. references are to the page of the Transcript of Proceedings filed in the United States Court of Appeals for the Seventh Circuit.

"'[T]he inferences which could be reasonably drawn from the evidence as to appellant's relationship to the goods place the case within the ambit of the cases in which the evidence of possession—actual or constructive—has been thought sufficient.' *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2nd Cir. 1965)" (App. A, infra, p. 2)

The indictment in this case charged Petitioner as a principal, alleging he possessed these goods, knowing them to have been stolen. No mention was made of a possible aider and abettor role. During preliminary proceedings, the Assistant United States Attorney referred to and outlined the government's theory that Scalise was in constructive possession of these items. (Tr. 259) Again, in his opening statement the Assistant United States Attorney told the jury that the government would prove that Scalise "was working with [Bills] * * * and had at least constructive possession of these goods along with Bills." (Tr. 267) During arguments for a judgment of acquittal at the conclusion of all the evidence, government counsel made similar representations concerning the government's theory that Scalise was in constructive possession of the items. (Tr. 842) Finally, in opening argument the government again referred to its theory that constructively Scalise possessed this merchandise. (Tr. 892-3)

At the government's request the trial judge instructed the jury:

"The defendant Scalise may be found guilty of the crime charged in the indictment even though he did not have actual — constructive possession of the said Sears items, if the Government has proven beyond a reasonable doubt that he wilfully and knowingly aided and abetted the defendant Bills possession of the said Sears items stolen from an interstate shipment, and he did

so knowing that the said defendant Bills had possession of the Sears items, and further that he knew that the items had been stolen.

* * *

Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

Whatever a person is legally capable of doing himself, he can do through another person by causing that person to act. If the acts of another person are wilfully ordered, directed or authorized by the defendant, he is responsible for such acts as though he personally committed them. In other words, every person who wilfully participates in the commission of a crime may be found to be guilty of that offense. Participation is wilful if done voluntarily and intentionally, and with the specific intent to do something the law forbids to be done.

In order to aid and abet another to commit a crime, it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participate in it as something he wishes to bring about. That is to say that he wilfully seek by some act of his to make the criminal venture succeed. (Tr. 954-6)

The Court of Appeals, in response to Petitioner's complaint that submission of this case to the jury on an aiding and abetting theory deprived him of fundamental fairness guaranteed by the Fifth and Sixth Amendments to the Constitution, responded that "there was no error in permitting his conviction upon proof that he was an aider and abetter on an indictment which charged him only as a principal." (App. A, *infra*, p. 2)

REASON FOR GRANTING THE WRIT

As a result of this Court's decision in *Nye & Nissen* v. *United States,* 336 U.S. 613 (1948), the courts of appeal have uniformly concluded that it is not improper for a trial judge to instruct the jury that they may find the defendant guilty of a charged offense if they find that he participated in that offense as an aider and abetter, rather than directly, despite the failure of the indictment to include an allegation charging the defendant as an aider and abetter. E.g., *Levine* v. *United States,* 7th Cir. 1970, 430 F.2d 641; *Glass* v. *United States,* 7th Cir. 1964, 328 F.2d 754; *Swanne Soon Young Pang* v. *United States,* 9th Cir. 1953, 209 F.2d 245; *United States* v. *Megna,* 5th Cir. 1971, 450 F.2d 511. In fact, we are unaware of any circuit decision holding that it is error to so instruct the jury where the facts warrant such an instruction. Compare *Pearson* v. *United States,* 6th Cir. 1951, 192 F.2d 681.

However, the rationale for these decisions is at odds with basic principles of fairness which this Court has repeatedly held are encompassed within Fifth and Sixth Amendment rights. An accused in a criminal case has an absolute right to be sufficiently advised by the indictment of the charge which he must be prepared to meet. See *Russell* v. *United States,* 369 U.S. 749 (1962). A defendant may not be tried nor convicted on a charge not described in the indictment. *Ex Parte Baine,* 121 U.S. 1; *Stirone* v. *United States,* 361 U.S. 212; cf. Rule 7(c), Federal Rules of Criminal Procedure, 18 U.S.C.A. In this case, it would add little to this Petition to chart the varying decisions explaining the degree of specificity

with which an indictment must be framed.[2] Petitioner's contention is not that he was inadequately warned of the Government's charge that he aided and abetted Bills' possession; it is that he was not forewarned at all. Cf. *Stirone* v. *United States,* 361 U.S. 212.

It is most often said an indictment need not charge aiding and abetting because Section 2 allows an aider and abettor to be "punished" as a principal. E.g., *Swanne Soon Young Pang* v. *United States,* 9th Cir. 1953, 209 F.2d 245; *Glass* v. *United States,* 7th Cir. 1964, 328 F.2d 754. By equating the liability of aiders and abettors with the manner of charging such behavior the Courts have avoided facing squarely the issue here presented. But, as the instant case illustrates, avoidance of the issue leads to a significant degree of confusion.[3]

Petitioner's case was submitted to the jury upon the dual theories that he possessed the stolen merchandise and that he aided and abetted Bills' possession of this merchandise. These theories were not necessarily compatible. If the jury believed that petitioner exercised dominion and control over the merchandise, it would have been warranted in finding, absent a satisfactory explanation, that

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[2] E.g., *United States* v. *Cruikshank,* 92 U.S. 542; *United States* v. *Simmons,* 96 U.S. 360 (1878); *United States* v. *Carll,* 105 U.S. 611 (1882); *Hagner* v. *United States,* 285 U.S. 427; *Russell* v. *United States,* 369 U.S. 749.

[3] Another purpose served by the requirement that an indictment set out the specific offense with which the defendant is charged is "to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *United States* v. *Cruikshank,* 92 U.S. 542, 558; see also *United States* v. *Lamont,* D.C.N.Y., 18 F.R.D. 27, 31.

he knew of the stolen character of these goods. *Wilson* v. *United States*, 162 U.S. 613; *United States* v. *Minieri*, 2d Cir. 1961, 303 F.2d 550; but see *United States* v. *Cameron*, 5th Cir. 1972, 460 F.2d 1394. However, proof that Scalise aided and abetted Bills by attempting to thwart Bills' apprehension by the police falls short of raising the inference which arises from possession. Cf. *Hernandez* v. *United States*, 9th Cir. 1962, 300 F.2d 114; *Hill* v. *United States*, 9th Cir. 1967, 379 F.2d 811. In view of this, other evidence would be necessary to sustain the judgment that Scalise knew there was merchandise in the rear of Bills' truck and that he knew this merchandise was stolen.

The court below ruled, in effect, that the judgment could be sustained on either theory. However, it is impossible, in view of the present state of the Record, to determine on exactly which theory the jury chose to convict. Had the indictment spelled out the different theories upon which the government desired to present this case, not only would Petitioner have been afforded the notice which the Sixth Amendment requires, but the Court of Appeals would have had an opportunity to gauge the jury's verdict separately on each theory to determine the sufficiency in law of these verdicts.

CONCLUSION

For the above and foregoing reason, it is respectfully submitted that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

WARREN D. WOLFSON,
Attorney for Petitioner.

SHERMAN C. MAGIDSON,
on the Brief.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

CHICAGO, ILLINOIS 60604

March 16, 1973

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. ROBERT A. GRANT, *Senior District Judge*
HON. MYRON L. GORDON, *District Judge*

ARGUED FEBRUARY 20, 1973

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 71-1876 vs.

JOSEPH JEROME SCALISE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 49 — Alexander J. Napoli, Judge.

ORDER

Defendant Joseph Jerome Scalise was convicted upon a jury trial for unlawful possession of goods in excess of $100 stolen from an interstate shipment of freight in violation of 18 U.S.C. §659. He was sentenced to the custody of the Attorney General for eight years.

Upon appeal, defendant raises two principal contentions. First, he contends that the evidence of his possession of the stolen goods was insufficient. A one-thousand carton load of Sears Roebuck and Company merchandise in interstate commerce was stolen on October 26, 1970. Ten days later the police discovered a small van parked in Oak Park, Illinois, packed with cartons visibly bearing Sears' labels. While the police maintained a surveillance, defendant drove his automobile up behind the van, a passenger exited from defendant's car and entered the van. The van then pulled away, followed closely by defendant, who, when he noticed the police in pursuit of the van, tried to block them. Both defendant and the van were stopped. The cartons in the van were proved to have been part of the stolen shipment. A Sears' catalog found on the right front seat of the van had the stolen items circled and contained fifteen latent fingerprints of the defendant. "[T]he inferences which could be reasonably drawn from the evidence as to appellant's relationship to the goods place the case within the ambit of the cases in which the evidence of possession — actual or custructive — has been thought sufficient." *United States* v. *Casalinuovo,* 350 F.2d 207, 209 (2nd Cir. 1965).

Second, defendant contends that it was reversible error (1) to omit an aiding and abetting count in his indictment and (2) to instruct the jury on aiding and abetting, and that (3) the evidence was insufficient to support his conviction as an aider and abettor. These contentions are all answered by *Levine* v. *United States,* 430 F.2d 641, 643 (7th Cir. 1970), *cert. denied,* 401 U.S. 949 (1971), where we concluded that "there was no error in permitting his conviction upon proof that he was an aider and abettor on an indictment which charged him only as a principal."

The conviction is affirmed.

AFFIRMED

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1391

JOSEPH JEROME SCALISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue presented by the petition is whether a trial judge may charge the jury on aiding and abetting when the indictment makes no reference to that basis for criminal liability.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of unlawfully receiving and possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659, and was sentenced to imprisonment for eight years. The court of appeals affirmed (Pet. App.).

The pertinent evidence is set forth in the opinion of the court of appeals. It shows that ten days after a truckload of Sears Roebuck merchandise was stolen while in interstate commerce, police officers in Oak Park, Illinois, discovered a parked van containing cartons

bearing the Sears label. They observed petitioner drive up to the van and discharge his passenger, who then entered the van and drove it off, with petitioner following closely behind. When the officers attempted to intercept the van, petitioner maneuvered his vehicle to block them. After a short chase, the van turned off the road and was stopped. The driver was arrested, and a Sears Roebuck catalogue containing petitioner's fingerprints was found on the right front seat. The merchandise in the van proved to be part of the stolen shipment.

At trial, on request of the government, the district judge in his closing charge gave the standard instruction on aiding and abetting (Pet. 6). While conceding that every court of appeals that has passed on the question has ruled against his position (Pet. 7), petitioner nevertheless urges that the giving of an aiding and abetting instruction when the indictment does not refer to the aiding and abetting statute, 18 U.S.C. 2, violates traditional notions of fairness and expands the indictment by allowing the jury to premise its conviction upon an alternate theory which may not have been consistent with a theory of guilt as a principal.

Initially, we note that petitioner can only speculate as to the jury's basis for conviction, since there was ample ground to convict petitioner of violating 18 U.S.C. 659 independently of the aiding and abetting theory. In any event, petitioner's argument fails; it has long been held that "all indictments for substantive offenses must be read as if the alternative provided by 18 U.S.C., §2 were embodied in the indictment." *United States* v. *Megna*, 450 F. 2d 511, 512 (C.A. 5); *United States* v. *Lester*, 363 F. 2d 68 (C.A. 6), certiorari denied, 385 U.S. 1002. See also *Nye and Nissen* v. *United States*, 336 U.S. 613; *United States* v. *Washington*, 287 F. 2d

819, 820-821 (C.A. 7), certiorari denied, 366 U.S. 969. Thus, the giving of an aiding and abetting instruction does not expand an indictment which may not contain an explicit reference to 18 U.S.C. 2.

Contrary to petitioner's contention (Pet. 8-9), the giving of the instruction did not conflict with the presumption of knowledge of the stolen character of the goods from proof of possession. The presumption instruction requires an initial determination that petitioner had possession. The aiding and abetting instruction was to the effect that even if petitioner had no possession of the stolen goods, he could still be convicted if he willfully and knowingly aided and abetted another who did knowingly possess contraband (Pet. 5-6). Accordingly, the instructions and the theories of guilt were not inconsistent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.